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Utah Department of Transportation v. 6200 South Associates, a General Partnership; H. Roger Boyer, Kem C. Gardner, and Valley Mortgage Corporation, Beneficiary : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE [redacted] UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff and Appellee, vs. 6200 SOUTH ASSOCIATES, a General Partnership; H. ROGER BOYER, KEM C. GARDNER, and VALLEY MORTGAGE CORPORATION, Beneficiary, Defendants and Appellants.	Case No. [redacted]920268-CA [redacted]

OPENING BRIEF OF APPELLANTS

Appeal from the Third Judicial [redacted]
Court, Salt Lake County,
The Honorable Pat B. Brian [redacted]

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JURISDICTION

This Court has jurisdiction of the appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1989).

ISSUES PRESENTED

I. **WHETHER THE TRIAL COURT ERRED WHEN IT REFUSED TO STRIKE IMPROPER AND UNSOLICITED TESTIMONY OF AN EXPERT WITNESS CONCERNING AN ALLEGED OFFER TO PURCHASE A SMALL PART OF THE REMAINING PARCEL AFTER CONDEMNATION.**

II. **WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED UDOT'S EXPERT TO TESTIFY ABOUT OTHER FREEWAY INTERCHANGE PROPERTIES WITHOUT ESTABLISHING THE REQUISITE FOUNDATION OF COMPARABILITY.**

III. **WHETHER THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW THE APPELLANT TO CHALLENGE THE UNDERLYING BASIS FOR AN EXPERT WITNESS'S TESTIMONY BY UTILIZING HYPOTHETICAL QUESTIONS.**

IV. **WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED UDOT TO ADMIT EVIDENCE THAT WAS INCONSISTENT WITH THE TRIAL COURT'S EARLIER RULING ON THE BEFORE CONDITION OF THE PROPERTY.**

V. **WHETHER THE CUMULATIVE TRIAL ERRORS WARRANT REVERSAL AND A NEW TRIAL.**

STANDARD OF REVIEW

In reviewing a trial court's decision on the admissibility of evidence and the scope of cross examination, this Court gives some deference to the trial court's decisions, but ultimately reviews those decisions under a correctness standard. State v. Ramirez, 817 P.2d 774, 781 n.3 (Utah 1991). When the appellate court determines that the trial court erred in its discretion, this Court must reverse. Id.

DETERMINATIVE STATUTE

Utah Code Ann. § 78-34-10.

Compensation and Damages - How Assessed.

"The court, jury . . . must hear such legal evidence . . . and thereupon must ascertain and assess:

. . .

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff. . ."

NATURE OF THE CASE

This is a condemnation case brought by the Appellee Utah Department of Transportation ("UDOT") to acquire by eminent domain a portion of the property of Appellants 6200 South Associates, Boyer and Gardner (the "Landowners") for the expansion of the I-215 freeway interchange in Salt Lake County. All the issues involving UDOT's entitlement to condemn and the factors influencing the property at the date of condemnation were settled by stipulation or preliminary rulings leaving only Just Compensation to be determined by jury trial.

On the sixth day of trial, the jury returned its verdict on damages and compensation upon which District Judge Pat B. Brian entered a Judgment on August 2, 1991. The Landowners thereupon filed their motion for additur and, alternatively, for a new trial which motion was denied by order dated December 30, 1991. [R. 294-297, 403.] The Landowners filed their Notice of Appeal from the Judgment on January 29, 1992.

STATEMENT OF FACTS

1. Situs and Characteristics of Property. The subject property consisted of 21.23 acres of unimproved land in the southeast

edge of the Cottonwoods of Salt Lake County, approximately a quarter of a mile east of the familiar landmark, Knudsen's Corner. The property's situs was on the southeast quadrant of the I-215 freeway which, although not actually built, had been an established, well-known and understood fact of life in the neighborhood for nearly twenty-five years. [R. 193-206.] Indeed, part of the Landowners' property had been condemned at earlier dates for portions of I-215 and the Appellants, themselves, purchased the subject property in the late 1970s in direct reliance upon the established although unbuilt freeway.[1]

Generally rectangular in shape, the highest and best use of the subject property depended upon open and unrestricted access on the west (via the UDOT frontage road built for that purpose) and on the north (along 6200 South Street). A reduced schematic drawing of the property before the 1988 condemnation is set out on the base map, Attachment 1. The rear access to the property came from the east along a small county road, 3000 East Street. The property had reasonable and easy access to utility facilities for property development.

2. **Motion in Limine Evidentiary Hearing.** Before the commencement of the trial on Just Compensation, the trial court conducted an evidentiary hearing, upon UDOT's motion, and determined that as of the date of condemnation, the existence of the I-215

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[1] In a preliminary motion in limine, the trial court found that UDOT had, long before 1988, committed by verified pleadings and statements on the public record, that I-215 was a committed and approved highway facility. The real estate market plainly understood the existence of and property acquisition for the freeway, although unbuilt. [R. 193-206.]

freeway system and attendant facilities had been established by UDOT for many years stretching back to 1963. [R. 195.] In fact, UDOT had twice previously condemned portions of the subject property for the initial freeway system, first in 1963 and second in 1973. In those condemnation actions UDOT represented in sworn testimony and trial maps that it had committed to establishing the freeway as designed. Indeed, UDOT received the advantage of special benefits as a result of the frontage road and 6200 South design in one or both condemnation actions. [R. 196.] As part of the construction of the freeway system, it was contemplated that not only would the subject property have access to the frontage road, but that 6200 South or Big Cottonwood Road would be relocated and widened to permit the freeway to function. [R. 195-96, 199.] The 6200 South interchange could not function if freeway traffic were poured onto old Cottonwood Road before it was committed to be relocated by UDOT in the 1973 condemnation suit.

The trial court found in favor of the landowner at the in limine hearing and ordered that the property be appraised in its condition BEFORE condemnation with the benefit of the freeway system, including the establishment of the frontage road and relocation of Cottonwood Road, as established facts, entering special Findings of Fact and Conclusions of Law to that effect. [R. 193.]

3. **Highest and Best Use of Total Property BEFORE Condemnation.** With its situs on the southeast quadrant of the I-215 freeway and with frontage road access, the total property prior to condemnation, was in the words of one of UDOT's experts, "a very good parcel of land, extremely well located, and a good physical development

parcel." [Tr. 790.] The orientation of the property was to the north and west from which its development potential existed. [Tr. 437.] The substantial testimony was that the best use of the property was for business office and moderate density housing, with both Salt Lake County's retained consultant, Webster, and the independent consultant, DeMass, testifying that the property, in all probability, could have been zoned for those purposes. Such highest and best use development depended, in turn, upon the continued availability of access to the property from the west and north.

UDOT did not call a zoning and planning expert. Its evidence was that the highest and best use BEFORE condemnation was office development for professional and service office use. [Tr. 92, 175-176, 437, 792.]

4. **The Condemnation Taking.** UDOT condemned 1.73 acres of the Landowners' property (as shown on the overlay of Attachment 1) for the construction of an enlarged I-215 freeway interchange at Knudsen's Corner. This partial-taking of the larger tract invoked Utah Code Ann. § 78-34-10(2) as to the amount of severance damages caused by the taking and "the construction of the proposed public project." The design of the freeway taking eliminated the frontage road to the west upon which the Landowners' property depended and it also took all access rights from the west, from the north on 6200 South, and from the northeast corner of 3000 East. [Tr. 85-86, 177, 287-89, 475.]

The Landowners' evidence was that the size and location of the physical taking, itself, did not significantly injure or depreciate the fair market value of the remaining property AFTER condemnation.

Rather, what caused the severance damage was UDOT's taking of all primary access on 6200 South and the frontage road, leaving the remaining property with access only from the rear by way of 3000 East Street. [Tr. 288-89, 471-73.] The testimony indicated that the condemnation taking had the effect of flipping the property on its head so that the most inferior, inaccessible parts of the property had to be used as the frontage and entrance AFTER condemnation.

The State's evidence was that the remaining property had at least as reasonable if not better access AFTER condemnation than the total property had BEFORE condemnation and that the access to the subject property was actually improved as a consequence of the taking for the freeway interchange. [Tr. 675-78, 822.]

5. Highest and Best Use of and Severance Damage to Remainder. Under the Landowners' evidence, the land planning consultants and appraisers could not determine a defined highest and best use for the remnant property AFTER condemnation. The tract was referred to as "a troubled property" which would be in a "transitional state." Zoning would be more difficult, financing would be speculative, and the advantage of access and orientation to the northwest in the BEFORE condition was a disabling handicap in the AFTER condition. [Tr. 179.] Because access was only available from the east AFTER the taking, planning principles, regulations and guidelines would not permit the type of access that would enable reasonable business or residential development on the subject property. [Tr. 179.] The testimony of the landowners' experts concerning severance damages was $1,189,000.00 by J. Brown and $1,316,000.00 by J. Cook. [Tr. 300, 484-85.]

The State's evidence was that there was no severance damages occasioned by either the taking of the 1.23 acre or the non-access along the west and north sides of the property. [Tr. 676-78, 825-27.] In fact, both UDOT witnesses stated that the construction of the freeway interchange resulted in the Landowners' remaining property having better and more developable access AFTER condemnation than it had BEFORE. While UDOT's witnesses Van Drimmelen and Clinger did not attempt to determine the amount of any special benefits from the taking of the Landowners' access, they both concluded that a buyer in the market would pay at least as much per acre for the remainder as for the total per acre BEFORE. [Tr. 690-91, 826.] Both Van Drimmelen and Clinger found there were some problems in gaining access from one interior portion to the other as a consequence of the taking of all the frontage road access, and determined that the cost to cure that access problem was $30,800.00 and $28,800.00, respectively. [Tr. 689, 827.] The latter figures were the State's severance damage evidence.

6. The State's Prejudicial Offer to Purchase the Remainder. The centerpiece issue of the entire trial was the impact that the taking of all the access, air, light and view on and along the west frontage road and the north 6200 South roadway had upon the former highest and best use and value of the Landowners' property. With the law in this state absolutely settled that offers to purchase are not admissible to demonstrate fair market value, including highest and best use, either BEFORE or AFTER the taking, UDOT called its witness, David Van Drimmelen. He opined, without objection, that even though all of the Landowners' access to the primary frontage and Cottonwood

roads had been taken, the best use and developability of the remaining property had been enhanced and improved, if anything, as a result of the construction of the freeway project and accordingly, there was no severance damages for emasculating the access. [Tr. 677-78.] Then in the closing moments of direct examination, UDOT counsel put the following inconsistent question to Van Drimmelen:

> Q. Mr. Van Drimmelen, if this property were zoned in its condition after the taking, the construction, as proposed in your opinion, would physically, the accessibility allow commercial development to take place?

[Tr. 683, emphasis added.]

After an objection as to foundation, Van Drimmelen responded, "yes" and UDOT counsel inquired, "[w]hat would your reason for that conclusion be?" [Tr. 684.]

In a non-responsive answer to whether the property would be physically accessible AFTER the taking, the witness blurted out the highly inflammatory and prejudicial statement:

> A. The second reason is that in a discussion with Heber Jacobsen, when I was -- met with him, he informed me that he had been negotiating with Chevron Oil to put a convenience store on the northeast corner of the site. And I believe that he -- in fact, he did state -- I have in my notes -- he was negotiating at $18 a square foot. But if the access -- if it was not accessible off of Big Cottonwood Canyon Road, that the offering price was somewhere in the neighborhood of 10 to 12. I called Chevron Oil, to ask them if this was the case. They confirmed it. They did confirm the $18.

[Tr. 685, emphasis added.]

Landowners' counsel objected vigorously to this obviously inadmissible evidence and moved that the entire Van Drimmelen response with regard to the speculative Chevron Oil proposal be stricken from the record and that the jury be admonished to disregard

the evidence. [Tr. 685.] UDOT counsel acknowledged awareness that the witness was going to volunteer the Chevron conversation, but admitted only that the mention of the price of $18 a square foot was improper. Judge Brian granted the motion to strike the specific amount of the offer, but refused to strike testimony relating to the offer. [Tr. 685-86.] In an anemic effort to cure the damage, the trial court stated:

> COURT: "The portion of the answer that related to a negotiated offer will be stricken from the offer. The rest of the answer will remain."

[Tr. 685-86.]

In a further conference, outside the jury's presence, the Landowners renewed the objection to the testimony and implored the court to cure the error. [Tr. 693-98.] The court declined to do so.

The evidence at trial from both sides concerning market value of the subject property, both BEFORE and AFTER condemnation, was in the range of $2.50 to $4.30 per square foot. What the jury heard from Van Drimmelen's intentionally calculated response was that Chevron was willing to offer $18 a square foot with access on Big Cottonwood Road and $10-$12 if there were no access. Judge Brian's ruling only struck out the prices and left before the court the testimony of a potential offer from Chevron for some amount.

7. **Evidence of Other Interchange Properties Without Requisite Foundation of Comparability**. The injurious effect of blocking access to a property located in the vicinity of a freeway interchange was one of the key questions in the trial. Testimony of comparable properties which had sold in the market with that disability was clearly admissible in Utah provided there was a foundation laid as to

elements of comparability including names of buyer and seller, location, zoning, date and terms of the sale, etc.[2] Both the Landowners and UDOT offered, and the lower court received in evidence, comparable sales of other property. [Tr. 273-84, 451-69, 661-71, 796-801.]

However, when Clinger was called by UDOT as its closing witness, UDOT offered through him photographs of alleged business or commercial properties located near freeway interchanges in Salt Lake and Davis Counties. The witness was unable to tell the court, as a foundation to admissibility of the photographs, anything about:

(1) The name of the owner or previous owner of the property;

(2) Whether the property had ever sold;

(3) The size, shape, zoning or development potential;

(4) The access of the property, a central issue in the case;

(5) Whether the access had been changed or blocked in a fashion comparable to the subject property;

(6) Whether the photographed property was an economic unit; whether it had been foreclosed, was in receivership or bankruptcy;

(7) The history of the property, and whether the property's use had been impaired, downgraded or changed as a result of highway condemnation.

All that was proffered was a series of six (6) green tinted photographs of undefined properties situated somewhere near a freeway

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[2] Department of Transp. v. Jones, 694 P.2d 1031 (Utah 1984); State Road Comm'n. v. Peterson, 12 Utah 2d 317, 366 P.2d 76 (Utah 1961).

interchange. [Tr. 810-820.] The Landowners objected to all of the photographs because they lacked evidentiary foundation as required by the governing law of this State. [Tr. 813-15.] The Landowners' objections were overruled and Judge Brian received the photographs of properties on the theory that they demonstrated business property development near freeway interchanges and, remarkably, because the witness Clinger had "relied upon the photos in formulating his opinion." [Tr. 815.] Landowners' counsel inquired of the trial judge if the photos had been of properties in Chicago or Los Angeles, could the photos have been received on the simple self-serving statement that the witness had relied upon them, noting that such a standard would allow a value witness to testify to virtually anything, so long as he somehow relied. The trial court denied the objection and received the photographed properties. [Tr. 815.]

8. Prejudicial Error in Refusing to Allow Landowners to Cross Examine the Expert Value Witness by Using Hypothetical Questions. After UDOT's experts Van Drimmelen and Clinger had both testified that UDOT's taking of all access on the west and north of the property had not damaged the market value of the remaining property AFTER condemnation, Landowners' counsel attempted, on cross examination, to pursue questions regarding the importance of the property's access for its best and reasonable use in both the BEFORE and AFTER condition. The probe consisted of hypothetical questions in which the expert was asked to assume a different set of facts to test the validity, consistency and credibility of the witness's opinion. Twice Landowners' counsel attempted cross examination based on a hypothetical assumption as to the subject property.

Astonishingly, UDOT objected twice and the court sustained both objections.

During the cross of UDOT's expert, Van Drimmelen, the following question was asked and objection sustained:

Mr. Campbell (for the Landowner):

> Q: So that portion of the property in the north area, say above the area that is entitled 6200 South Associates -- let's just assume for a moment, Mr. Van Drimmelen, the highest and best use of this property were to sell off the north portion of the property, before the taking, from the south.

Mr. Coleman (for UDOT):

> Q: Your honor, I will object to that, assuming conditions of the property that didn't exist.

Mr. Campbell: This is an expert witness. I am entitled to go into hypothetical questions on cross-examination.

. . .

The Court: Sustained.

. . .

Mr. Campbell: So that let's assume that the property had been sold off prior to February of 1988, the north half. This taking would have landlocked that property, wouldn't it?

Mr. Coleman: Your honor, I object again on the basis he is assuming facts not in evidence.

The Court: The objection is sustained. It does assume facts not in evidence.

[Tr. 720.]

Judge Brian took the same position when it came to UDOT's second expert, Clinger. On cross examination, the Landowners asked the following hypothetical question to test the validity of the witness's conclusion that taking all the access on the west side of the subject

property had no injurious effect upon highest and best use and market value. The following took place:

Mr. Campbell (for the Landowner):

> Q: Let me ask you this, then. Let's just take this property, before the taking, we will just assume that the property had no access from the northwest, the 900 feet along the frontage road -- let's assume that before the taking that wasn't there, and it had no access at all, either, to Cottonwood Canyon Road, none at all. So that the property had only one access, and that was an orientation to the east. Right?
>
> A. Okay.
>
> Q: So that as you would have come off the interstate freeway, before the taking, you would not have had any way to get to this property except on 3000 East. Now, with that in mind, is it your -- on that assumption, is it your opinion that his property would have been worth more in the market than what you found it to be worth before the taking?

Mr. Coleman (for UDOT):

> Your Honor, again, he is asked to assume facts not in evidence.

The Court: Sustained. The Court has permitted questions in that regard. The Court's position is that the witness should not assume facts not in evidence.

Mr. Campbell: I think this question tests the credibility of his statement.

The Court: Sustained.

[Tr. 760-61.]

On post-judgment and new trial proceedings, UDOT continued to argue that hypothetical questions on cross examination are inadmissible because they are "based on facts not in evidence," citing two authorities, Nichols v. Oregon Short Line R. Co., 25 Utah 240, 70 P. 996 (1902), and Annotation, Modern Status of Rules Regarding Use of Hypothetical Questions in Eliciting Opinion of

Expert Witness, 56 A.L.R. 3d 300 § 6(a). It turns out that both citations involve only the presentation to an expert witness on direct examination of a hypothetical question where either record facts have been deleted or assumed facts have been added. Even though UDOT miscited the ALR authority and failed to offer a single precedent in which hypothetical questions on cross examination were precluded, the trial court sustained UDOT's objection and reaffirmed the ruling. [Tr. 720, 761; R. 404.]

9. **Total Value Evidence and Jury Verdict.** The error of the trial court is clearly manifested in the jury verdict. The opinion testimony of the Landowners and UDOT on the market value of the land taken and severance damages to the remaining property are:

Landowners' Experts	F.M.V. Land Taken	**Severance Damages**	Total Opinion
1. John Brown, A.S.A.	324,230	**1,316,534**	1,640,764
2. Jonathan Cook, M.A.I.	294,069	**1,189,127**	1,483,196
UDOT Experts			
1. David Van Drimmelen M.A.I.	233,746	**30,870**[3]	264,616
2. Bryce Clinger, M.A.I.	282,800	**28,800**[3]	311,600

After barely two hours of deliberation (with lunch included), the jury returned its verdict into open court as follows:

1. Fair market value of 1.73 acres condemned $271,447.20

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[3] Not severance, but alleged cost to cure internal access.

2. Severance damages to the remaining 20.49 acres caused by the taking and loss of access $144,607.60

3. Total damages **$416,054.80**

It was with regard to the severance damages in which the case-in-chief of the Landowners was rejected by the jury. The trial judge entered judgment on the jury verdict and denied new trial and other relief based upon errors of law in post-judgment Rule 59 proceedings.

SUMMARY OF ARGUMENT

The prejudicial error committed by the trial court in this case compels a reversal of the judgment below and a new trial on just compensation issues.

The evidence of the witness Van Drimmelen on the so-called Chevron Oil offer was inflammatory and engineered to plant the indelible perception with the jury that UDOT's taking of all of the business and primary access to the property was of no consequence; that the remaining property was worth many times more in its severed condition AFTER condemnation than it was worth BEFORE condemnation. The trial court's refusal to strike all testimony relating to the offer and to admonish the jury to disregard it was serious error. This issue alone, warrants reversal and new trial; else wise, UDOT and its witness will be rewarded for having intentionally introduced knowingly inadmissible evidence.

For the trial court to permit UDOT to demonstrate and argue before the jury other interchange properties without any foundation as to comparability constituted reversible error. The grim reality is that the jury was force fed the prejudicial misperception that properties contiguous to an interchange are somehow inevitably

benefitted and suitable for commercial development despite the crippling effects of access exappropriated by UDOT. The admission of the photographs of other properties without foundation of comparability was unprecedented in an eminent domain trial in Utah and is reversible error.

The trial court erred prejudicially in cutting off cross examination based on hypothetical questions of both UDOT experts to test the validity of their testimony that access to the freeway system BEFORE condemnation was not central to the property's highest and best use and value. The case law and authorities in Utah plainly permit and encourage penetrating cross examination. Moreover, the trial court committed error when it permitted UDOT to undermine the ruling on the evidentiary in limine issue of the existence of the I-215 freeway system as part of the valuation analysis of the total property as of the date of taking. UDOT's experts violated the law of the case in treating the freeway as though it were functionally inoperable because of the lack of feeder roads. It was reversible error to permit UDOT's evidence.

Although each of these errors is reversible error in its own right, collectively the weight of prejudice is suffocating. It poisoned the proceeding depriving the landowners of the fundamental right to a fair trial. Under the cumulative error analysis adopted by the Utah Supreme Court a new trial is mandated.

ARGUMENT

POINT I.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO STRIKE ALL UDOT EXPERT TESTIMONY REGARDING THE INADMISSIBLE CHEVRON OFFER TO PURCHASE A PART OF THE REMAINING PROPERTY.

The illicit, gratuitously volunteered testimony of Van Drimmelen regarding the alleged Chevron Oil offer as to part of the remaining property came at a highly critical point in the trial and in the closing minutes of Van Drimmelen's testimony-in-chief. The testimony prior to Van Drimmelen had clearly shown that the condemnation taking and particularly the elimination of all access from the two primary roadways serving the property had required the remaining property to rely on back-door access and had effectively flipped the property upside-down. The resulting severance damages to the remaining property were concluded by preeminent land planners to be severe, with two expert witnesses having quantified the severance injury at $1,316,000.00, and $1,189,000.00, respectively.

Thus, the seminal question in the trial was on the line when Van Drimmelen took the stand. Van Drimmelen testified that not only was there no severance damages, whatsoever, to the remaining property caused by the taking and the loss of all the primary business and residential access, but that the remaining property was more valuable and better off AFTER the loss of access than BEFORE. His direct examination was all but ended when UDOT counsel asked him, assuming the property were commercially zoned after the taking, whether there was adequate access "physically" to allow commercial development. [Tr. 683.] Suddenly and without warning, Van Drimmelen blurted out

information regarding an alleged Chevron Oil offer to purchase a corner of the remaining property for a price of $18.00 s/f with access on Big Cottonwood Road and $10-$12 s/f with no access on such road. Those figures, erupting into the courtroom, were between 250% and 450% higher than anyone had appraised the Landowners' property, even BEFORE the condemnation taking. It was highly inflammatory and shocking testimony, made all the more prejudicial by the fact that Landowners' counsel was required to object to the testimony and move to strike. It was further emphasized by the fact that the trial judge, while striking the dollar amount of the alleged Chevron offer, permitted the balance of Van Drimmelen's testimony to stand.

i. **Offers and Negotiations as to Potential Future Purchases Are Flatly Inadmissible.** In determining fair market value, including severance damages, in eminent domain, the law has been settled in this Country since the turn of the century that offers to purchase, or negotiations as to potential future transactions, are inadmissible. The United States Supreme Court established the rule in Sharp v. United States, 191 U.S. 341 (1903):

> [Offers for purchase] at most [are] a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may also have so slight a knowledge on the subject as to render his opinion of no value, and inadmissible for that reason. He may have wanted the land for some particular purpose disconnected from its value. Pure speculation may have induced it, a willingness to take chances that some new use of the land, might in the end, prove profitable. There is no opportunity to cross examine the person making the offer, to show the various facts. Again, it is of a nature entirely too uncertain, shadowy and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings.

Id. at 115 (emphasis added). See also Continental Pipe Line Co. v. Irwin Livestock Co., 625 P.2d 214, 217 n.5 (Wyo. 1981); City of Wichita v. Jennings, 199 Kan. 621, 433 P.2d 351 (1967); Ruth v. Department of Highways, 145 Colo. 546, 359 P.2d 1033, 1035 (1961) (en banc).

The rationale for excluding offers or negotiations is that they are easily fabricated, are used as negotiating ploys, and do not satisfy the most fundamental test of fair market value -- what the willing buyer actually paid to the willing seller. State Road Comm'n. v. Hansen, 14 Utah 2d 305, 383 P.2d 917 (1963); McAlester Urban Renewal Authority v. Watts, 516 P.2d 261, 263 (Okla. 1973).

2. **Van Drimmelen Knew That the Alleged Chevron Offer was Inadmissible**. By virtue of the comments of UDOT counsel, there was reason for the court to believe that the question was a "plant" and that there was advance knowledge that testimony on the alleged Chevron offer was coming.[4] What is important is that Van Drimmelen knew that the Chevron testimony was inadmissible and intentionally introduced it notwithstanding that knowledge. The witness is a

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[4] Indeed, Mr. Coleman's statement to the court indicates that he was aware that the offer to purchase would be gratuitously volunteered in Van Drimmelen's testimony.

> That [meaning the amount of the offer] shouldn't have come in . . . [t]he purpose of the testimony was to indicate that in the after condition, if there was a demand for commercial property in the before, it was still there in the after . . . [t]he reason for bringing the testimony out with this witness with regard to inquires respecting commercial development in the after, it was to show that if this property could have been used for commercial purposes in the before condition, it could have been used for commercial purposes in the after.

[Tr. 697-98, emphasis added.]

member of the American Institute of Real Estate Appraisers, carrying the "MAI" designation. The MAI organization has published a book acknowledged by Van Drimmelen, entitled *Condemnation Appraisal Practice*, Donnelley & Sons Co., Chicago, Illinois (1967), which contains the following direction to MAI appraisers:

> ". . . If evidence of the price of similar land is to be admitted, the rule is firmly established that it must be confined to the amount actually paid in a completed transaction. Mere offers, whether made by the owner of such land or to him, are inadmissible."

Id. at 48 (emphasis added). Van Drimmelen was portrayed by UDOT as an experienced testifying expert. He was all that.

Van Drimmelen succeeded in injecting into the proceeding evidence that was incompetent and inadmissible.

3. **Failure to Strike All of Van Drimmelen's Chevron Testimony was Prejudicial and Reversible Error**. The court's denial of the Landowners' motion to strike all of Van Drimmelen's testimony regarding the Chevron offer denied 6200 South Associates a fair trial. By rejecting the Landowners' argument and striking only the alleged offering prices, the court let stand before the jury the prejudicial allegation that Chevron was prepared to buy a portion of the remaining property with or without access. Only because of some technical objection which remained unexplained to the jurors, the jury was not entitled to know the price (although due to Van Drimmelen's tactics they did indeed know the price). The stained Chevron testimony undercut the Landowners' evidence that the highest and best use AFTER condemnation was not for business purpose, but rather, speculative.

Landowners' counsel could not pursue the Chevron testimony which the trial court left hanging, for fear it would only further cement the whole concept in the minds of the jurors. Consequently, the inflammatory episode left the jury with the indelible implication that the Chevron offer (although absolutely inadmissible under the law of this State), demonstrated extreme commercial interest in the property by one of the largest, most sophisticated companies in the world.

UDOT is not entitled to obtain the fruits of admittedly inadmissible evidence. If the alleged offering price was inadmissible, then the fact of the offer, and related evidence was equally inadmissible. Accordingly, it was prejudicial error for the trial court not to strike all evidence relative to Chevron's alleged offer and not to have instructed the jury to disregard the evidence. Moore's Federal Practice, ¶ 61.07 [1] (1992) ("when . . . an evidentiary ruling does violate a party's substantial rights, the error is prejudicial and reversal is warranted"); Joseph v. W.H. Groves Latter Day Saints Hospital, 7 Utah 2d 39, 318 P.2d 330, 333 (1957) (emphasis added) ("If [the error] appears to be of sufficient moment that there is a reasonable likelihood that in the absence of such error a different result should have been eventuated, the error should be regarded as prejudicial and relief should be granted"); Jordan v. Medley, 711 F.2d 211 (D.C. Cir. 1983) (admission of prejudicial evidence was not harmless and warrants a new trial).

A new trial is required to correct the manifest injustice that occurred in the Van Drimmelen testimony.

POINT II.

THE LOWER COURT COMMITTED REVERSIBLE ERROR BY ADMITTING PHOTOGRAPHS AND TESTIMONY OF OTHER FREEWAY INTERCHANGE PROPERTIES WITHOUT FOUNDATION.

A fundamental principle of eminent domain law is that evidence of other properties is not admissible absent adequate foundation of comparability. The lower court violated that principle, committing reversible error by admitting prejudicial photographs and testimony of other properties without the requisite demonstration of comparability.

UDOT offered through one of its appraisers photographs of six developed commercial properties located near freeway interchanges along the Wasatch Front; but without any foundation whatsoever. No foundation was presented concerning the ownership, sale, size, shape or financing of the photographed properties. Foundation was not laid concerning the economic vitality or viability of the properties photographed; whether they were successful or in foreclosure, receivership or bankruptcy; or whether they had been impaired or down-graded as a result of highway condemnation. No foundation was established on issues as fundamental as access or highest and best use.

Despite this foundational vacuum, and over the strenuous objections of the landowners, the prejudicial photographs and testimony were welcomed into evidence by the court and took center stage in the proceeding.

1. <u>Evidence of Other Properties Without the Requisite Foundation is Inadmissible</u>. The Utah Supreme Court has repeatedly

declared that in condemnation cases evidence of facts relating to other properties is flatly inadmissible without the requisite foundation showing comparability.[5] The test of comparability is defined in Redevelopment Agency of Salt Lake City v. Mitsui Inv., Inc., 522 P.2d 1370 (Utah 1974):

> Real estate has always been regarded as unique because no two parcels can be exactly alike. It is certainly not to be supposed there will be found sales which are identical as to time, location, quantity and various characteristics of the property. The requirement is that it meet the test of "reasonable comparability." That is, that these factors exist in sufficient similarity that the sale can fairly be regarded as having some probative value at arriving at a proper appraisal of the property.

Id. at 1373.

Unless a foundational demonstration of sufficient similarity can be made, the test of reasonable comparability cannot be met, and the evidence is inadmissible.

In State v. Larkin, 25 Utah 2d 295, 495 P.2d 817 (1972), a case involving the condemnation of property in Box Elder County, the plaintiff attempted, on both direct examination and cross examination to introduce evidence of sales of properties located near freeway interchanges in the Brigham City and Tremonton areas. The court sustained the defendant's objection excluding evidence of those other properties because they were too remote both as to distance and type of area. The Utah Supreme Court upheld the trial court's rejection of the evidence noting that a "survey of the record reveals that the

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[5] Redevelopment of Salt Lake City v. Mitsui Inv., Inc., 522 P.2d 1370 (Utah 1974), State Road Comm'n. v. Larkin, 27 Utah 2d 295, 495 P.2d 817 (1972), State Road Comm'n. v. Woolley, 15 Utah 2d 248, 390 P.2d 860 (1964), State Road Comm'n. v. E. Peterson, 12 Utah 2d 317, 366 P.2d 76 (1961).

dissimilarities indicated in the properties were sufficient to preclude a ruling by this Court that the trial court abused its discretion in rejecting the improper testimony." Id. at 820.

The error of admitting photographs of other properties without foundation is underscored by this Court's recent ruling in Carpet Barn v. State by and through Dep't. Of Transp., 786 P.2d 770 (Utah Ct. App. 1990). In that case the landowner, through his expert appraisal witness, attempted to introduce into evidence photographs and testimony concerning the access allowed to other properties near the Carpet Barn. Ironically, UDOT strongly objected to the introduction of that evidence arguing that it was inadmissible absent a foundational showing of substantial similarity between each of the properties and the subject property. The trial court excluded the evidence and the landowner appealed. This Court affirmed the trial court adopting the argument of UDOT (which is directly contrary to its position in this case) holding that the evidence was inadmissible because a demonstration of similarity between the properties had not been made.

> We agree with the State [UDOT] that the issue of reasonable access as it affects a determination of severance damages is dependant on the particular facts and circumstances of each case. [Citations omitted.] Because appellants failed to demonstrate complete similarity between the other properties and their own circumstances, the court did not abuse its discretion in refusing to allow evidence of access afforded other properties, especially since such evidence would have little bearing on the question of diminished value of this property as a result of the severance.

Id. at 774. The Carpet Barn analysis skewers UDOT's inconsistent argument in this case.

2. **Reliance By An Expert Does Not Render Inadmissible Evidence Admissible.** In this case the lower court admitted the tainted evidence stating, almost talismanically, that it was proper because the testifying expert relied upon it. But the court's ruling is wrong; devoid of support in the rules of evidence or the interpreting case law.

Expert testimony, like the testimony of all other witnesses, must have a proper foundation to be admissible. Inadmissible, prejudicial testimony is not laundered admissible simply because an expert says he relied upon it. Otherwise the exception swallows the rule and an expert would be a conduit for any evidence otherwise inadmissible, regardless of how inflammatory, irrelevant, or prejudicial.

The lower court's error stems from a misapprehension of Rule 703 of the Rules of Evidence. That rule provides that an expert's opinion may not be excluded merely because it is based on facts or data that are inadmissible evidence. But "while an expert may base an opinion on such evidence, it does not magically render the [inadmissible] evidence admissible." Rose Hall Ltd. v. Chase Manhattan Overseas Banking, 576 F. Supp. 107, 158 (D. Del. 1983) (emphasis added). Testimony that is inadmissible because it is prejudicial, misleading, irrelevant or otherwise improper remains inadmissible, even though an expert relied upon it. Barrel of Fun, Inc. v. State Farm Fire & Cas. Co., 739 F.2d 1028 (7th Cir. 1984). In Barrel of Fun, the trial court permitted an expert to testify to evidence not otherwise admissible because it was relied upon by the expert in forming his opinion. The Seventh Circuit Court of Appeals

reversed the trial court and remanded the case for a new trial with the instruction that the court exclude the offending testimony. The Court explained:

> In admitting Roth's testimony the district court relied on Fed.R.Evid. 703. We believe the court misapprehended the scope and effect of that Rule. It correctly noted that under Rule 703, expert testimony may not be excluded merely because it is based on facts or data that are inadmissible in evidence. However, the Rule does not guarantee the admissibility of all expert testimony that meets its criteria if such testimony runs afoul other evidentiary requirements. For instance, expert testimony otherwise admissible under Rules 702 and 703 may still be excluded "if its probative value substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury . . . ." Fed.R.Evid. 403. Because we hold today that PSE evidence, whether in the form of raw data or expert opinion interpreting or extrapolating upon that data is inherently suspect, Rule 703 cannot, standing alone, provide an avenue for its admission.

Id. at 1033, (emphasis added).[6]

3. **The Evidence was Patently Prejudicial**. In the instant case, the actions of UDOT were highly prejudicial. UDOT surrounded the jury with scores of photographs from other interchanges along the interstate highway depicting commercial development of abutting properties; but without any foundation demonstrating the requisite

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[6] See also Hutchinson v. Groskin, 927 F.2d 722 (2nd Cir. 1991) (trial court committed reversible error by permitting an expert witness to testify to matters otherwise inadmissible even though he relied on the information in forming his opinion); Christophersen v. Allied-Signa Corp., 939 F.2d 1106 (5th Cir.), cert. denied ___ U.S. ____, 112 S.Ct. 1280, 117 L.Ed.2d 606 (1992) (expert testimony is inadmissible if its probative value is outweighed by danger of unfair prejudice, confusion of the issues or misleading the jury); United States v. Scavo, 593 F.2d 837 (8th Cir. 1979) (expert testimony is subject to exclusion under Rule 403 if probative value is outweighed by risk of unfair prejudice); United States v. Katz, 213 F.2d 799 (1st Cir.), cert. denied 348 U.S. 857 (1954) (an expert witness may rely upon inadmissible hearsay testimony as a ground for his opinion, but that does not render the hearsay testimony admissible).

similarity between the properties pictured and the subject property. Without that foundation it is impossible to determine whether the purported developments depicted in the photographs were relevant. Without that foundation, it is impossible to know whether the development of the properties photographed represents the highest and best use thereof or an over improvement resulting in economic obsolescence; or whether the development has been validated by market acceptance and success or invalidated by bankruptcy, foreclosure or receivership. Without that foundation it is impossible to discern whether the photographed properties have the same access impairment and limitations as the subject property in the AFTER condition.

Nevertheless, the evidence came in and the properties were paraded past the jury in photographic detail. Because every photographed property located at an interstate interchange was in some stage of business development, the subject property could be commercially developed. That was the message broadcast to the jury in living color, six times. That was the clear, unavoidable implication of those photographs, reinforced and underscored six times by the court's denial of the objections to admissibility.

Permitting the jury to view and consider the irrelevant, misleading properties depicting commercial development severely prejudiced the landowners in this case. It is plain error and mandates reversal and a new trial.

POINT III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FORECLOSING APPELLANTS' CROSS EXAMINATION OF UDOT'S EXPERT WITNESSES BASED UPON HYPOTHETICAL QUESTIONS.

1. The Evidence Preclusion Affected Both of UDOT's Experts.

On cross examination, Landowners' counsel attempted to inquire of Van Drimmelen and Clinger the value they had placed on the property BEFORE condemnation stemming from the abundant access the property enjoyed to I-215, the frontage road, and Big Cottonwood Road (all of which were lost by the UDOT taking). To punctuate the importance of the access from the west and north BEFORE condemnation and its impact on value, the Landowners put a hypothetical question to Clinger on cross examination, asking him to assume that there had been no access to the subject property BEFORE condemnation from the west and the north -- what effect would that have had upon the BEFORE value. (See Statement of Facts at p. 3 herein.) The question was clearly designed to test the witness's credibility and the validity of his opinion as to the critical issue of access. Remarkably, UDOT objected, claiming that Clinger was being asked "to assume facts not in evidence," an objection which is fundamentally improper on cross examination of an expert. State v. Peek, 1 Utah 2d 263, 265 P.2d 630, 637-38 (Utah 1953). Without even discussing the prevailing law, Judge Brian sustained UDOT's objection noting that it is "the Court's position is that the witness should not assume facts not in evidence." [Tr. 760-61.]

The same drama was played out in the Landowners' cross examination of Van Drimmelen. Twice with regard to two successive

questions, UDOT objected to the Landowners' questions because they "assumed facts not in evidence." Twice, the Landowners acknowledged that was the precise purpose for the question: to test the validity of the expert's premise on the importance of access to the property, both BEFORE and AFTER the taking by stretching the premise to its logical extreme. Twice, the trial judge cut off this keystone examination on the sole ground that the hypothetical facts were assumed. [Tr. 720.]

2. **Overwhelming Case Law Permits, Indeed, Encourages Hypothetical Questions on Cross Examination of an Expert.** The principle has been so well settled in American trial procedure that cross examination of an expert witness on assumed facts relevant to the case is permitted and encouraged, that authoritative precedent is barely necessary. The Supreme Court of Utah acknowledged the principle nearly 40 years ago in the condemnation case of State v. Peek, 265 P.2d 630, 637 (Utah 1953) in which the court stated:

> "A witness who is given an opinion of value may . . . in the discretion of the court, be asked questions on cross examination, for the purpose of testing his opinion, which would be improper upon direct examination. He may, for example, be asked if certain assumed facts would modify his judgment . . . ."

Id. at 637.

Noting that great latitude in the cross examination of experts is permitted so long as it is reasonably connected up to the case, the Oregon Supreme Court held in Samuel v. Vanderheiden, 277 Or. 239, 560 P.2d 636 (1977) that it was prejudicial error to bar the cross examiner from "exposing the weakness" of the defendant's expert

opinion by demonstrating that a change in the underlying facts would require a modification of the expert's opinion:

> We hold this was a proper hypothetical question on cross examination. By sustaining defendant's improper objection to that question, plaintiff was improperly limited in the discharge of the 'formidable' task imposed upon the cross examiner . . . to expose, if he could, the weakness of the testimony given by an expert witness in response to a question on direct examination . . . by showing that 'a change in the facts' assumed by the expert to be true would necessitate a change in that opinion. [Citing Wulff v. Sprouse-Reitz Co., Inc., 498 P.2d 766 (Or. 1972).]

Id. at 636.

It is no doubt true that on direct examination, an expert witness, in formulating his express opinion, must rely upon facts that are established in the record and, generally, cannot predicate a conclusion upon unproven or speculative factors. State Road Comm'n. v. Peterson, 12 Utah 2d 317, 366 P.2d 76 (Utah 1961). Panter v. Marshall Fields Co., 646 F.2d 271 (7th Cir.), cert. denied 454 U.S. 1092 (1981); Davenport v. Taylor Feed Mill, 784 S.W.2d 923 (Tenn. 1990); Roberts v. C & M Ready Mix Concrete Co., 767 P.2d 769, 771 (Colo. Ct. App. 1988).

But when it comes to cross examination, the cross examiner is not confined to the theory, bases, or details of the expert on direct examination. He may pursue hypothetical questions to test the expert's conclusions in all aspects:

> The witness may be asked to answer questions which present hypothetically the facts claimed to constitute the case or defense of the cross-examining party; . . .
>
> Moreover, although on direct examination the hypothetical questions must be based upon facts which the evidence tends to prove, no such limit is ordinarily imposed upon cross examination; for the purpose of testing the accuracy or credibility of the expert, or the value of

> his opinions, he may be interrogated as to pertinent hypothetical cases concerning which no evidence has been given.

Jones on Evidence Civil and Criminal, § 14.29, p. 665-66 (6th Ed. with supp. 1991) (emphasis added).

On new trial argument, UDOT claimed that an annotation in 56 A.L.R. 3d 300 § 6(a) (1974) supported its view that hypothetical questions of an expert witness were improper and objectionable.[7] It turns out, however, that UDOT's citation to the A.L.R. annotation related to direct examination and not to cross examination of the opponent's expert. As to the latter, the succeeding paragraph 6(b) of 56 A.L.R. 3d 300 states:

> Thus, although some courts have concluded that the rule that a hypothetical question must assume only facts in evidence applies regardless of the nature of the examination being conducted, it has been acknowledged in other decisions that a hypothetical question which assumes matters which are not supported by the evidence may properly be asked during the cross examination of an opponent's expert witness for the purpose of testing his knowledge or competency. (Emphasis added.)

56 A.L.R. 3d at 323.

It was, thus, clear error for Judge Brian to shut out the light from cross examination of UDOT's expert witnesses that would have reflected from the hypothetical questions on access to various parts of the property prior to condemnation. It would have been the crucible to test Van Drimmelen's and Clinger's conclusions that the condemnation of all of the primary access of the Landowners' property

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[7] The statement in section 6(a) sets out that "[A]s a general rule, the courts uniformly recognize that the factual assumptions made in a hypothetical question propounded to an expert witness must . . . include only such matters as are supported by the evidence . . . ."

by UDOT did not injure or depreciate by one dollar the value or best use of the remaining property.

3. **The Error of the Trial Court was Prejudicial and Reversible, Requiring a New Trial.** The result of the court's exclusion of the hypothetical questions on cross examination of Van Drimmelen and Clinger was serious and fundamental. The backbone of 6200 South's case was not that the taking of the 1.23 acres had caused irreparable severance damage to the remaining land; the Landowners could have turned that property over to the State without severance injury had the taking not included all of the property's access rights on the two primary sides, the west and north. It was the expropriation of all ingress and egress to the north and west which was the seminal issue in the case. What the excluded cross examination of Van Drimmelen and Clinger was designed to develop was whether, in arriving at the property's market value BEFORE condemnation, they had placed importance upon the access from the north and west. If they had given it high importance (which it appears likely), then the loss of those entire rights of access, ingress and egress, should have, contrary to their testimony, resulted in a significant devaluation of the remaining property. If Van Drimmelen and Clinger had not placed emphasis on access from the north and west from the total property BEFORE condemnation, then the question would have been presented: How were they able to use comparable sales in establishing the BEFORE value which had direct access to a freeway interchange or frontage road? Thus, the witnesses were facing a "catch-22" which, in all events, would have

been most damaging to the their credibility and the validity of their opinions.

With the trial court's ruling, the jury was robbed of the evidence which would have permitted it to weigh the significance of UDOT's expert testimony on the central issue of the trial. Under such circumstances, the erroneous exclusion was prejudicial and reversible error requiring a new trial. State Road Comm'n. v. Johnson, 550 P.2d 216 (Utah 1976). The gap in the cross examination did not just infect a portion of UDOT's case on market value, it infected all of UDOT's value evidence. The Landowners' rights which were injured were not only substantial, under Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990), the injury was prejudicial under the controlling precedent. See also Joseph v. W.H. Groves Latter-Day Saints Hospital, 318 P.2d 330 (Utah 1957); Utah Rule of Evidence 103.

A new trial on the issue of severance damages and Just Compensation is required under the exigent error of the trial court.

POINT IV.

PREJUDICIAL ERROR WAS COMMITTED BY THE TRIAL COURT IN PERMITTING UDOT TO SUBVERT THE EARLIER ILLUMINING EVIDENTIARY RULINGS WHICH HAD BECOME THE LAW OF THE CASE AT TRIAL.

Once a court makes a ruling on the admissibility of trial evidence, that ruling is binding during the duration of the trial. This law of the case doctrine avoids delay, prevents repetitive arguments being made, and allows the parties to proceed in the presentation of evidence under defined law. Richardson v. Grand

Central Corp., 572 P.2d 395, 397 (Utah 1977); Salt Lake City Corp. v. James Const., 761 P.2d 42, 45 (Utah Ct. App. 1988).

In the evidentiary hearing on UDOT's motion in limine, the trial court plainly determined that in valuing the Landowners' property before condemnation, the property was to be appraised with the knowledge that the I-215 freeway interchange, and attendant frontage and feeder roads would benefit the subject property. This was because UDOT's well established, long standing plans and commitment to construct the freeway project had become a market reality reflected in the value of the property. Included within that project was the diamond interchange, frontage road contiguous to the subject property, and the necessary relocation and widening of Big Cottonwood Road (6200 South) extended to the west and east to allow the freeway interchange to fully operate. The in limine ruling of the trial court was reduced to formal Findings of Fact, Conclusions of Law. [R. 193-206.]

At the valuation trial UDOT, and its witnesses, subverted and violated what plainly had become the law of the case. It offered evidence that the property in the BEFORE condition did not benefit from the freeway interchange because the interchange would have dumped traffic onto a narrow, inadequate county road, the old Cottonwood Road. Even to the untrained eye the interchange could not reasonably function with such a palpably unsuitable feeder road. The anatomy of any freeway interchange includes and requires a feeder road sufficient to accomodate the freeway generated traffic. Indeed, UDOT's plans long before 1988, had reflected feeder and corollary

roads that would have made the 6200 South interchange viable and operable. The court's in limine ruling recognized that fact.

What the UDOT expert witnesses did by testifying that there would not be an adequate road network to feed and receive traffic from the I-215 interchange was to make that interchange, before condemnation, a farce. In doing so, UDOT, with the trial court's erroneous permission, was able to subvert and undo the court's in limine ruling. Such constitutes reversible error. Menin v. County Court, 697 P.2d 398, 399 (Colo. Ct. App. 1984) (affirming trial court contempt order for violation of prior motion in limine order); Commonwealth of Penn. v. Local Union 542, Int'l Union of Operating Engineers, 73 F.R.D. 551, 553 (E.D. Pa. 1976) (finding lawyer in contempt for failure to adhere to trial court's earlier evidentiary determination).

POINT V.

THE WEIGHT OF THE CUMULATIVE ERROR IS PATENTLY PREJUDICIAL, MANDATING A NEW TRIAL.

Each of the errors discussed in the proceeding points is, by itself, sufficiently prejudicial to require a new trial. But the prejudice caused by the errors is compounded exponentially when viewed cumulatively and in the context of the entire trial. Indeed, the collective weight of prejudice is suffocating. In response to the cumulative impact of trial errors, Utah appellate courts have adopted a "cumulative" error basis for granting new trials. Under the cumulative error analysis a new trial is warranted when multiple errors are made at trial, even though no single error, standing alone would require reversal.

In Ivie v. Richardson, 336 P.2d 781, 787 (Utah 1959), the Utah Supreme Court held that where errors are committed by the trial court, which "may not by themselves justify a reversal, [they] may well, when considered together with others, render it clear that a fair trial was not had." Id. at 787. In Ivie, the court found that the cumulative effect of the trial court's errors in instructing the jury and the admission of evidence of the defendant's insurance coverage was prejudicial and required a new trial. Similarly, the Supreme Court used the cumulative error analysis in reversing the lower court and granting a new trial in Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928 (Utah 1990), where, as in this case, the trial court's errors consisted of erroneous limitation of cross examination and erroneous exclusion of evidence. See also Dawson v. Olson, 543 P.2d 499, 508 (Idaho 1975) (following Ivie v. Richardson and requiring a new trial based on cumulative error).

The cumulative effect of the trial court's refusal to strike unsolicited, improper testimony concerning the Chevron offer, its allowance of testimony of other properties without any foundation of comparability, and its refusal to allow Landowner's counsel to challenge the basis for the experts' opinions through the use of hypothetical questions had a devastating impact on the proceeding, robbing the Landowners of a fair, impartial trial.

While there is sufficient basis to reverse the lower court for any one of the errors described above, at a minimum, the Landowner is entitled to a new trial due to the cumulative prejudicial effect of the multiple errors.

CONCLUSION

For the reasons set forth above the lower court committed prejudicial error. Consequently, this court should reverse the lower court and remand the proceedings for a new trial.

DATED this 8th day of September, 1992.

ROBERT S. CAMPBELL, JR.

KEVIN EGAN ANDERSON
of and for
CAMPBELL MAACK & SESSIONS

Attorneys for Appellants 6200 South Associates, H. Roger Boyer and Kem C. Gardner

CERTIFICATE OF SERVICE

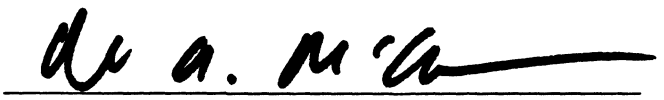
I hereby certify that I am a member of and/or employed by the law firm of Campbell Maack & Sessions, One Utah Center, Thirteenth Floor, 201 South Main Street, Salt Lake City, Utah, and that in said capacity and pursuant to the Utah Rules of Appellate Procedure, true and correct copies of the Opening Brief of Appellants were served upon:

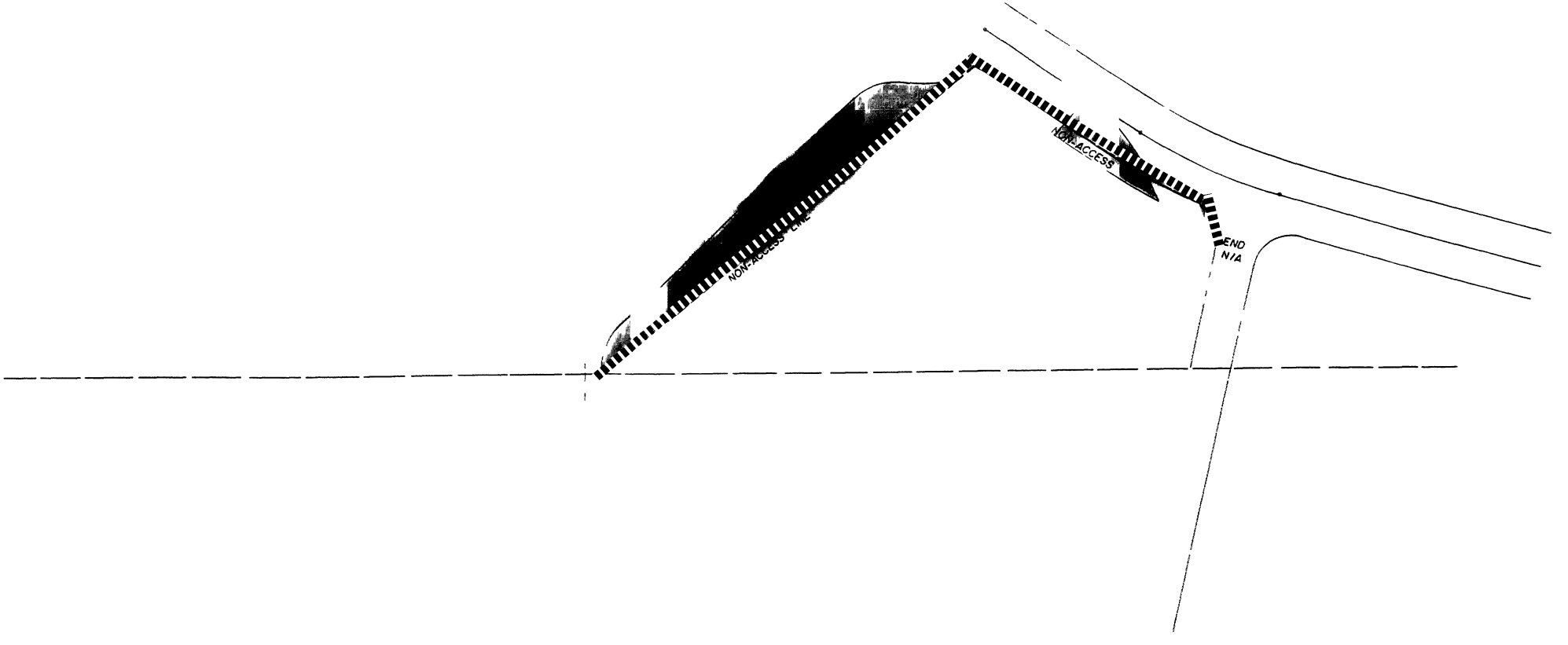
Donald S. Coleman, Esq.
Assistant Attorney General
236 State Capitol Building
Salt Lake City, UT 84114

by U.S. mail, postage prepaid, this 8th day of September, 1992.

DATED this 8th day of September, 1992.

CAMPBELL MAACK & SESSIONS

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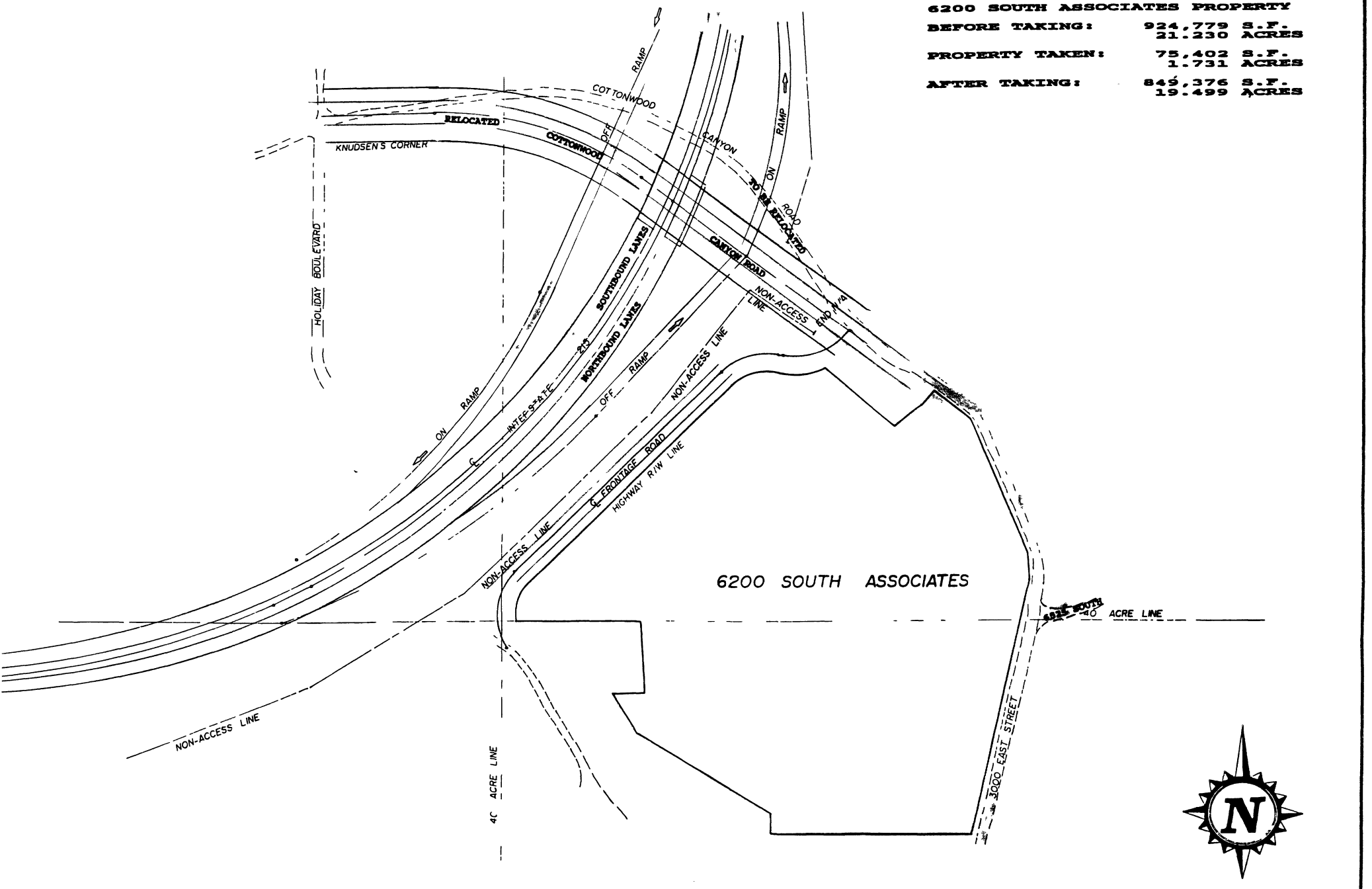
6200 SOUTH ASSOCIATES PROPERTY
BEFORE TAKING: 924,779 S.F.
21.230 ACRES
PROPERTY TAKEN: 75,402 S.F.
1.731 ACRES
AFTER TAKING: 849,376 S.F.
19.499 ACRES
COTTONWOOD
RAMP
RELOCATED
COTTONWOOD
OFF
CANYON
ON RAMP
TO BE RELOCATED
ROAD
KNUDSEN'S CORNER
HOLIDAY BOULEVARD
SOUTHBOUND LANES
CANYON ROAD
NON-ACCESS LINE
215
INTERSTATE
NORTHBOUND LANES
ON RAMP
OFF RAMP
NON-ACCESS LINE
FRONTAGE ROAD
HIGHWAY R/W LINE
NON-ACCESS LINE
6200 SOUTH ASSOCIATES
6325 SOUTH
40 ACRE LINE
NON-ACCESS LINE
40 ACRE LINE
3000 EAST STREET
N